Supreme Court, U.S.
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No. 91-263

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FOOD GIANT, INC.,

Petitioner,

v.

WILLIAM C. PORTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

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November 4, 1991

QUESTION PRESENTED

Where an employer, in 1973, induces a former employee to return to his prior employment by giving oral assurances that he will receive pension rights as if there had been no break in service, does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt the employee's rights under state law to enforce or recover for his reliance on the employer's 1973 promise, even though ERISA provides that it shall not supersede state law with respect to "any act or omission which occurred before January 1, 1975" ?

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No. 91-263

FOOD GIANT, INC.,

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Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises out an action for breach of contract and fraud based on representations made by petitioner Food Giant, Inc., in 1973 to induce respondent William C. Porter to return to his prior employment with Food Giant. The Court of Appeals of Georgia, in a unanimous opinion, held that the trial court improperly dismissed respondent's contract and tort claims as preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, ("ERISA"), because ERISA provides that its provisions do not supersede state law with respect to "any act or omission which occurred" before January 1, 1975. 29 U.S.C. § 1144(b)(1).

In 1957 respondent William Porter was hired by Food Giant, which was then known as Alterman Bros., and continued to work for Food Giant for 13 years until 1970, when he voluntarily left to take a new position with the McCormick Spice Co. In early 1973,

Food Giant set-out to convince Mr. Porter to return to manage one of its stores. The President of Food Giant, Sam Alterman, contacted Mr. Porter about rejoining the firm and, at Mr. Alterman's request, Mr. Porter went to the firm's headquarters to discuss Food Giant's interest in reemploying him with Food Giant's Vice President and Superintendent of Retail Store Operations, Max Alterman. *See* Pet. App. 2a.

Max Alterman also served as the secretary of Food Giant's retirement program and, in order to persuade Mr. Porter to leave McCormick, promised him that if he returned to work for Food Giant, his seniority rights for the thirteen years he had already spent with Food Giant would be reinstated.[1] This included an assurance that Food Giant's retirement program would provide benefits on the same basis as if there had been no break in Mr. Porter's service with Food Giant. Mr. Porter's testimony concerning this pledge has been confirmed by Max Alterman in an October 1984 letter to Food Giant's Insurance Director, in his answer to the plaintiff's complaint, and in an affidavit filed in this action. *See id.* Food Giant has not disputed that Max Alterman had full authority to make this commitment on its behalf.

Mr. Porter immediately accepted Food Giant's offer by resigning his position with McCormick and returning to work with Food Giant. He served an additional nine and a half years with Food Giant until 1982 when he left after 22½ years of service.

When Food Giant refused to pay retirement benefits in accordance with its representations in 1973, Mr. Porter brought this action against Food Giant and Max Alterman in the State Court of DeKalb County, Georgia, seeking damages under state law for breach of contract, and fraud and misrepresentation. After Food Giant filed a motion to dismiss on the basis that the entire action was preempted by ERISA, Mr. Porter filed an amended complaint adding an alternative count for recovery under ERISA. Food Giant's motion to dismiss was denied.[2]

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[1] This was subject to an exception, which is not relevant here, that Mr. Porter's vacation time would not exceed that granted new employees.

[2] Food Giant removed the action to the United States District Court for the Northern District of Georgia based on the ERISA count, but the district court found that removal was improper and remanded the action to state court. *See* Pet.

Food Giant then filed a motion for summary judgment. Food Giant argued that it had no obligation to honor any oral representations made to Mr. Porter in 1973 because the ERISA legislation passed in 1974 requires that modifications to an employee benefit plan must be in writing. 29 U.S.C. § 1102(a)(1); *see Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (oral agreements concerning pension benefits are not enforceable under ERISA). With respect to Mr. Porter's claims that Food Giant's oral representations gave rise to liability under state contract and tort law, Food Giant argued that these claims are preempted because ERISA provides that it "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" effective January 1, 1975. 29 U.S.C. § 1144(a).

In response, Mr. Porter argued that ERISA did not preempt state contract or tort law remedies for Food Giant's 1973 conduct because it expressly provides that it shall *not* supersede state law with respect to "any act or omission which occurred" before January 1, 1975. 29 U.S.C. § 1144(b)(1). Mr. Porter also argued that, even if his claims were governed by ERISA, ERISA did not bar recovery because the oral commitments made by Max Alterman were not modifications of the pension plan, but implemented written provisions of the plan that authorize disregarding breaks in service for individual employees.

The State Court of DeKalb County ruled that Mr. Porter's state law claims were preempted by ERISA, but that genuine issues of material fact precluded judgment on Porter's claim under ERISA. It entered a final judgment pursuant to O.C.G.A. § 9-11-54(b), which is identical to Fed. R. Civ. P. 54(b), to permit immediate review of the preemption ruling. Pet. App. 7a-9a.

The Georgia Court of Appeals reversed. It recognized that federal circuit courts are divided over the interpretation of the "act or omission" language, but found that, in this case, "the acts or omissions giving rise to the cause of action occurred in 1973, when Alterman induced Porter to return to Food Giant's employ by promising him that his full seniority rights . . . would be restored and that the 'acts or omissions' [exception] from ERISA clearly applies." *Id.* at 5a. It also rejected Food Giant's arguments that

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App. 13a-16a.

there were no material facts in dispute concerning the state law and ERISA claims. *Id.* After the Georgia Supreme Court unanimously denied its petition for certiorari, Food Giant filed its petition for certiorari with this Court. *Id.* at 6a.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. Respondent does not dispute that there are conflicts in the case law concerning the interpretation of the "act or omission" exception to ERISA preemption. The conflicts, however, are not those portrayed by this Petition, and review of this case does not provide a proper vehicle for resolving these conflicts. The federal circuit courts, with the isolated exception of the Fifth Circuit, have sought to apply the "act or omission" clause in a practical manner based on the facts presented in each case. In doing so, the courts have disagreed on the jurisdictional effect of the clause, and have emphasized different factors in determining whether state or federal law should govern when applying pension plan provisions to pre-1975 events. But the conflicts that emerge from these cases are not presented in this case, which involves no questions of federal jurisdiction and concerns the enforceability of pre-1975 oral assurances directed at a specific individual to induce him to provide a benefit to the employer. Moreover, because this exception to preemption only applies to cases involving an act or omission before January 1, 1975, its significance will continue to decline over time, reducing any justification for review by this Court.

2. Contrary to Petitioner's argument, the decision of the Supreme Court of Georgia is not necessarily in conflict with the rule applied in the federal courts of Georgia. The Eleventh Circuit, which has jurisdiction over the federal courts in Georgia, has never addressed the interpretation of Section 1144(b)(1). Although the Eleventh Circuit has adopted the pre-September 30, 1981, precedents of the Fifth Circuit, it is not clear whether the Eleventh Circuit will give effect to the Fifth Circuit's construction of Section 1144(b)(1). Consequently, Petitioner's contention that there is "an irreconcilable conflict between the state and federal courts of Georgia," Petition at 7, is, at best, premature until the Eleventh Circuit addresses this issue.

3. The decision below is not at odds with the language of

ERISA, nor with the Congress' intent in passing the statute. To the contrary, Congress explicitly provided that ERISA shall not displace state law with respect to any act or omission before January 1, 1975 and the interpretation adopted by the court below, and other federal and state courts, is necessary to avoid the burdens that would be imposed by retroactive application of ERISA to pre-1975 conduct performed in reliance on state law.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT A PROPER VEHICLE FOR RESOLVING THE INTERPRETATION OF THE "ACT OR OMISSION" EXCEPTION TO ERISA PREEMPTION.

In order to avoid the retroactive application of its provisions, ERISA provides that it shall not supersede state laws "with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1). Neither the other provisions of ERISA nor the legislative history elaborate on what acts or omissions are included in this exception, and, given the diverse contexts in which pension disputes arise, it is not surprising that the efforts of courts to address this provision have led to fact-oriented applications.

Review of the decision of the Supreme Court of Georgia here does not provide an appropriate vehicle for resolving the interpretation of the "act or omission" clause for three reasons. First, the sharp split among the courts that petitioner portrays does not exist. With the isolated exception of the Fifth Circuit, all of the courts that have addressed this provision have sought to develop its interpretation by focusing on the significance of the pre-1975 acts or omissions involved in a particular claim, as the Georgia courts did in the decisions below. Second, the principal differences that have arisen in the case law concern questions of federal jurisdiction and pension plan interpretation that are not presented by the decision in this case. Third, because it only applies to acts or omissions prior to 1975, the significance of the "act or omission" clause will continue to decline as time passes, and the narrow factual context presented here does not provide an appropriate means for providing guidance on its interpretation.

A. The Conflict of Majority and Minority Views Portrayed By Petitioner Does Not Exist.

Petitioner urges the Court to grant certiorari in this case on the basis that "there is a clear and direct conflict" among the circuits. Petition at 10. According to Petitioner, the conflict is between a majority view that follows the Fifth Circuit's decision in *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981), in concluding that "ERISA nearly always preempts state law if benefits are denied after January 1, 1975," Petition at 12, and a minority view, exemplified by the decision below, which focuses on a "fact-based analysis concerning what pre-ERISA acts occurred." *Id.* at 11. Examination of the cases, however, shows that the majority/minority conflict Petitioner portrays is neither clear nor direct. To the contrary, the construction of Section 1144(b)(1) in the 1981 Fifth Circuit decision upon which Petitioner relies represents not only a minority view, but an isolated precedent that has not been embraced by other state and federal courts.

The Fifth Circuit's decision in *Woodfork* was among the first circuit court decisions to address the "act or omission" provision of § 1144(b)(1).[3] The factual situation presented in *Woodfork* involved a union member who, because of a disciplinary proceeding in 1964, lost his seniority status and was unable to secure further work with employers that participated in the union's pension plan. When he obtained the minimum age for pension eligibility in 1969, Woodfork inquired about pension benefits and was told that he was ineligible because he had not accumulated 90 days of pension credit during the preceding two years, as required by the plan. Woodfork, however, did not submit a formal request for pension benefits until after ERISA was enacted in 1974, at which time the pension plan formally confirmed that he was ineligible for benefits. *Id.* at 968. Woodfork originally sought pension benefits under federal law but, to avoid a change of venue, amended his complaint to substitute state claims. *Id.* at 969. He

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[3] The Eighth Circuit had previously addressed the issue in *Winer v. Edison Bros. Stores*, 593 F.2d 307 (8th Cir. 1979), and the First Circuit issued its decision in *Quinn v. Country Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981), just two months before the Fifth Circuit's decision in *Woodfork*.

argued that his state claims were not preempted because his cause of action arose before January 1, 1975, and, alternatively, that, because he was denied benefits on the basis that he did not satisfy the pension plan's requirements when he obtained the minimum age for eligibility in 1969, his claims were based upon an "act or omission before January 1, 1975." *Id.* at 970.

The Fifth Circuit concluded that the record was inadequate to resolve whether Woodfork's cause of action arose before January 1, 1975, and, therefore, further proceedings were necessary to determine whether his state claims were preempted by ERISA. *Id.* at 974. It also addressed the "act or omission" issue, but did not limit its discussion to the particular facts presented by Woodfork's case. Instead, it articulated a general construction of the relationship between the "cause of action" and the "act or omission" exceptions, stating that "[w]e think a reasonable construction of the statute is to confine the use of the latter exception to acts or omissions that set in motion legal proceedings other than causes of action." *Id.* at 971. Thus, under the *Woodfork* construction, the only function of the "act or omission" exception is to prevent ERISA from preempting pre-1975 state proceedings, such as pension-related administrative proceedings and criminal prosecutions. *Id.* Otherwise, ERISA preempts state law with respect to any cause of action that arises after January 1, 1975, even if the claim concerns pre-1975 conduct.

In the ten years since the *Woodfork* decision, *no* other federal circuit has endorsed this construction. Instead, other courts have applied the "act or omission" provision by focusing on whether the particular factual situation involved in the dispute should be governed by state or federal law. *See* Annotation, *What Constitutes an "Act or Omission" For Purposes of § 514(b)(1) of Employee Retirement Income Act of 1974*, 52 A.L.R. Fed. 515, 518 (1981). Thus, none of the decisions from other circuits that Petitioner cites as the "majority view," *see* Petition at 12 n.12, endorse or adopt the Fifth Circuit's construction in *Woodfork*. Although the result in some of these decisions would be the same under the construction in *Woodfork*, the reasoning is different. Moreover, the result in at least one case is, in fact, contrary to *Woodfork* and to the rule that Petitioner portrays as the majority view.

For example, in *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983), a case

Petitioner cites as an example of the "majority view," the Seventh Circuit addressed whether state law or ERISA governed claims by (1) employees who had voluntarily withdrawn from the pension plan and signed releases waiving their pension credits prior to the enactment of ERISA, but were denied benefits after 1975; and (2) employees who were laid-off prior to 1975, but were denied benefits after the enactment of ERISA because the employer claimed that the lay-off resulted in a forfeiture of their pension credits. The court held that the claims of the employees who signed waivers prior to 1975 were governed by state law, not ERISA, saying that "plaintiffs cannot rely on the fact that they allegedly discovered the effects of their waivers after ERISA, if critical acts constituting their effective waivers occurred before ERISA came into effect." *Id.* at 1233. This result and reasoning is contrary to *Woodfork*, and contrary to Petitioner's argument that the Seventh Circuit has adopted a "majority view" that the "critical" act is always the denial of benefits. *See* Petition at 12. With respect to the claims of the employees who had been laid-off prior to 1975, the Seventh Circuit held that ERISA preempted state law with respect to these claims. 686 F.2d at 1234. This holding, however, was not based on the construction in *Woodfork*, but on the Court's conclusion that for these claims "the critical act for purposes of ERISA was not the layoffs, but was the denial of plaintiffs' application for pension credits." *Id.* at 1234. This effort to identify the "critical act" in the context of each claim reflects the analysis Petitioner labels as the minority view. *See* Petition at 11.

The other cases Petitioner cites as the "majority view" also do not endorse *Woodfork*, but focus on the factual context presented by the case. While these cases hold that the post-ERISA denial of benefits *may* be the relevant "act or omission" for determining whether ERISA or state law applies, they do not hold, as Petitioner claims, that "the only 'significant' or 'critical' act is" the denial of benefits. Petition at 12.[4] Indeed, the

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[4] *See Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307, 312-13 (8th Cir. 1979); *Tanzillo v. Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 202 (1989); *see also Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49, 51 (3d Cir. 1985) (Third Circuit holds that where cause of action accrues after 1975, but significant acts occurred prior to 1975, "act or omission"

reasoning of some of the cases Petitioner labels as the "majority view" has been endorsed in the decisions that Petitioner criticizes as the minority view. *See, e.g., Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1503 (9th Cir. 1983) (citing Eighth Circuit decision *Winer v. Edison Bros. Stores Pension Plan* with approval).

Therefore, the majority/minority division Petitioner portrays simply does not exists. With the exception of *Woodfork*, no other federal or state court has adopted a rigid rule that the "act or omission" exception never applies to cases where the denial of benefits occurs after January 1, 1975. To the extent that the decision below rejected the Fifth Circuit's construction in *Woodfork*, it was not rejecting a "majority view" but following the course which has been adopted by every federal circuit court other than the Fifth Circuit.[5]

B. The Principal Conflicts Over The Interpretation Of The "Act Or Omission" Provision Are Not Presented By This Case.

Outside the Fifth Circuit, courts have adopted the view that the "act or omission" clause "seems to have been inserted 'to permit courts to apply state law, even if the cause of action accrued after January 1, 1975, in cases where that result most fairly accommodates the interests of all affected parties -- the beneficiaries, participants, and fiduciaries of and contributors to ERISA trusts.'" *Quinn v. Country Club Soda Co., Inc.*, 639 F.2d 838, 841 (1st Cir. 1981) (quoting *Bacon v. Wong*, 445 F.Supp. 1189, 1192 (N.D. Cal. 1978)); *accord Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307, 313 (8th Cir. 1979). This effort to assess the competing interests on a case-by-case basis has, not surprisingly, led to differences among the circuits. These differences, however,

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clause may dictate that federal court apply state law to the claim).

[5] Petitioner also cites three decisions by state intermediate appellate courts, two of which are in accord with the decision below and one of which is contrary. *See* Petition at 15-17. These decisions merely reflect the same differences that have arisen between the Fifth Circuit and other federal courts and do not provide an independent basis for Supreme Court review, particularly given the fact that they are decisions by intermediate state appellate courts.

are not fairly presented for review by the decision at issue here.

For example, federal courts have divided over whether federal courts lack jurisdiction over claims that involve an act or omission before January 1, 1975 or whether the provision merely dictates that the federal court must apply state law. *Compare Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1983) (provision is jurisdictional), *and Quinn v. Country Club Soda Co.*, 639 F.2d at 841 (same), *with Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49, 51 (3d Cir. 1985) (provision dictates choice of law); *see also Reiherzer v. Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978) (ERISA provides for federal jurisdiction and application of federal common law for any cause of action that arises after it was enacted). This issue of federal jurisdiction, however, is not presented by the decision of the Georgia Supreme Court, here. There is no dispute that the state courts of Georgia have jurisdiction to adjudicate the claims below whether they are governed by state law or by ERISA. *See* 29 U.S.C. § 1132(e)(1) (state courts have concurrent jurisdiction over claims for benefits).

In addition, most of the cases involving the "act or omission" language have involved disagreements over what law should govern when benefits are denied after January 1, 1975 based on the application of general eligibility provisions to pre-ERISA events. Some courts have emphasized that the denial of benefits resulting from a post-January 1, 1975, application of a pension plan's provisions, even if it involves consideration of pre-ERISA events, should be governed by ERISA's fiduciary standards. *See Tanzillo v. Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989). Other courts have stressed that, when the denial is the consequence of "unequivocal pre-effective date interpretations of or exercises of discretion under the plan," the validity of the denial should be governed by the state law that prevailed at the time of the event. *Menhorn*, 738 F.2d at 1501; *accord Lamontagne v. Pension Plan of the United Metal & Machine Pension Fund*, 869 F.2d 153, 156 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 72 (1990); *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d at 894-95. Although arguably in conflict, the two lines of cases can be reconciled because the cases holding that state law should apply have also stated that when the

denial involves "a significant act of discretion under or interpretation of the plan which took place after ERISA's effective date," the validity of the denial should be assessed under ERISA rather than state law. *Menhorn*, 738 F.2d at 1502; *see also Tanzillo*, 769 F.2d at 144 n.5 (rejecting *Menhorn* but acknowledging that it is distinguishable); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230, 1232-34 (state law applies to claims of employees who signed waiver acknowledging no right to benefits before 1975, but where denial is based on pre-1975 layoffs that do not provide clear notice of their effect on benefits, the critical act is the post-ERISA interpretation of plan and denial of benefits).

The issues raised by these pension plan-interpretation cases, however, are not squarely presented by the facts in this case. This case does not focus on general plan provisions, but on an assurance by Food Giant, personally addressed to Mr. Porter, that certain pension benefits would be provided if he returned to work for Food Giant. Moreover, there is no question of ambiguity, discretion, or lack of notice with respect to the representations made to Mr. Porter concerning his pension status. Nor is there an issue concerning whether ERISA's fiduciary standards should apply to the denial of the claim since the aspect of ERISA on which Food Giant relies is not its fiduciary standards, but the requirement that plan provisions be written rather than oral. Accordingly, this case does not present an appropriate vehicle for addressing the differences reflected in the federal circuit court cases.

C. The Declining Significance Of The "Act or Omission" Provision Counsels Against Review Of The Narrow Issues Presented By This Case.

As the cases above indicate, questions concerning the application of the "act or omission" provision may arise in a myriad of different factual situations.[6] The case-by-case development of

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[6] Application of the provision also arises in other contexts such as mistaken payments to the pension fund, *see, e.g., Reuther v. Trustees of Trucking Employees of Passaic & Bergen County Welfare Fund*, 575 F.2d 1074 (3d Cir. 1978), and illegal conduct by plan trustees which does not involve the denial of benefits, *see, e.g., Wayte v. Rollins International, Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (2d Dist.

the interpretation of this provision in different contexts is inevitable, and the benefits of Supreme Court review are likely to be limited. *Cf. Pierce v. Underwood*, 487 U.S. 552, 561-63 (1988) (where questions involve multifarious factual situations and are not susceptible to useful generalization, intense appellate scrutiny is unlikely to be useful). This case, in particular, presents only a narrow subset of the factual situations in which the "act or omission" provision may be at issue. In contrast to the numerous cases concerning the effect of the "act or omission" clause on denials involving the interpretation of general plan provisions, only two other reported cases involve the situation involved here, the enforceability of pre-1975 oral representations. *See Petrolite Corp. v. Barnhouse*, 812 S.W.2d 341 (Tex. Civ. App., 13th Dist. 1991); *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989).[7]

In addition, the "act or omission" provision operates as a grandfather clause and its significance will continue to decline as time passes. Even under the broadest interpretation, the "act or omission" exception to ERISA preemption only applies to causes of actions where the "critical" or "significant" acts or omissions occurred before 1975. Although Petitioner speculates that a significant number of beneficiaries may be "affected by a wide variety of pre-ERISA acts or omissions," *see* Petition at 15 n.14, the number of cases where the "critical" actions at issue occurred over sixteen years ago is inherently limited, and will inevitably decrease as time passes.

II. THE DECISION OF THE GEORGIA SUPREME COURT IS NOT DIRECTLY IN CONFLICT WITH PRECEDENT BINDING ON THE FEDERAL COURTS IN GEORGIA.

As an independent basis for granting review, Petitioner argues that the decision of the Supreme Court of Georgia not to

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1985).

[7] In other cases where the enforceability of pre-ERISA oral contracts has been at issue, the effect of the "act of omission" provision has not been addressed, apparently because neither party relied on Section 1144(b)(1). *See Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 579 (1991).

adopt the construction offered by the Fifth Circuit in *Woodfork* "conflicts with binding precedent in the federal courts of Georgia." Petition at 17-18. This assertion, however, is based on an unjustified assumption.

The federal courts of Georgia are governed by the decisions of the Eleventh Circuit, and the Eleventh Circuit has never addressed the interpretation of Section 1144(b)(1). Petitioner's argument is based on the fact that the Eleventh Circuit has adopted the pre-September 30, 1981 precedents of the Fifth Circuit as its own, *see Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981), and *Woodfork* was decided by the Fifth Circuit in April, 1981. As discussed above, however, the construction of Section 1144(b)(1) that Petitioner relies upon from *Woodfork* went beyond the facts presented in the case and could be regarded as *dicta*. Thus, although the Eleventh Circuit has adopted *Woodfork* as precedent, it does not follow that it has also adopted the analysis of Section 1144(b)(1) offered by the Fifth Circuit as binding in other factual situations. The Eleventh Circuit may, as it has in the past, distinguish and refuse to extend prior Fifth Circuit precedent. *Cf. Gilmore v. City of Atlanta*, 864 F.2d 734, 738 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 70 (1990), (distinguishing prior Fifth Circuit precedent on its facts), *and id.*, at 746-47 (Clark, J., concurring in part and dissenting in part) (criticizing majority for limiting prior Fifth Circuit precedent). Post-1981 decisions of the Fifth Circuit extending *Woodfork* to other contexts, *see Degan v. Ford Motor Co.*, 869 F.2d 889, 894 (5th Cir. 1989), are *not* binding on the Eleventh Circuit and it is not known whether the Eleventh Circuit, if it ever has to decide this issue, will feel bound to follow the *dicta* in *Woodfork*, or would adopt the approach endorsed by other courts.

III. THE DECISION BELOW IS IN ACCORD WITH THE LANGUAGE AND INTENT OF ERISA.

Petitioner argues that certiorari should be granted because the decision of the Supreme Court of Georgia is "'fundamentally at odds with the goal of uniformity that Congress sought to implement' in enacting ERISA." Petition at 5 (quoting *Ingersoll-Rand v. McClendon*, 111 S.Ct. 478, 484 (1990)). This argument is based on the erroneous premise that exceptions to preemption

necessarily undermine the foundations of ERISA, and certainly does not provide a basis for granting review.

Congress explicitly provided that ERISA shall not supersede state law, not simply when the "cause of action arose" before January 1, 1975, but also with respect to "any act or omission which occurred" before January 1, 1975. 29 U.S.C. § 1144(b)(1). As this Court has observed, "ERISA did not become effective until January 1, 1975" and it "expressly disclaims any effect with regard to events before that date." *E.I. Malone v. White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978). Numerous federal and state court decisions going back over ten years have concluded that the plain language of this provision indicates that Congress intended that ERISA should not be applied retroactively to acts or omissions prior to 1975 just because the cause of action accrues after the effective date of ERISA. *See Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 541 (9th Cir. 1980); *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d at 893. Indeed, even some of the cases Petitioner cites for support recognize that "[t]he phrase 'act or omission' . . . apparently refers to those significant facts which give rise to a claim but which fall short of establishing a cause of action." *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d at 313; *accord Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d at 51-52 ("act or omission" provision is intended to ensure that ERISA is not applied retroactively to incidents occurring before January 1, 1975).

The enactment of ERISA necessitated a transition from state law to federal law. The decisions giving effect to the "act or omission" clause simply seek to minimize the disruption caused by the transition:

> The clear practical import of the act or omission clause is to prevent past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards established by ERISA simply because the conduct generates consequences subsequent to the ERISA effective date that give rise to what is, technically, an independent "cause of action."

Quinn, 639 F.2d at 841. Where the critical "act or omission" occurred when state law governed the conduct, federal law should

not be applied retroactively to impose duties that did not exist at the time. *See Jameson*, 765 F.2d at 51.

Thus, contrary to Petitioner's charge that these decisions impose "disruptive burdens" on plan sponsors and "uncertain interpretation[s]" on employee-participants, Petition at 5, 9, they, in fact, seek to avoid inconsistent burdens imposed by a retroactive change in substantive law. These decisions hold that the conduct of plan sponsors should be evaluated based upon the state law in effect at the time of the conduct, rather than the subsequently enacted standards of ERISA. *See, e.g., Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656 (9th Cir. 1983) (claimant cannot rely upon ERISA to challenge validity of waiver signed in 1971). Similarly, the enforceability of a promise made to an employee like Mr. Porter should be evaluated based on the state law in effect at that time, rather than being tested by new requirements introduced two years later by ERISA. *See* Pet. App. at 5a. These results do not undermine the goals of ERISA, but seek to implement an exception to preemption that Congress specifically provided to permit the transition from the pre-1975 law to ERISA to proceed in a sensible manner.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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